STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2000-654

April 6, 2001

CENTRAL MAINE POWER COMPANY
Request for Commission Investigation
Regarding the Plans of Special Minerals, Inc.
to Take Electric Service Directly from
International Paper Company

ORDER DECLINING TO
OPEN INVESTIGATION

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

Through this Order, we decline to open an investigation regarding International Paper's (IP) plans to provide electric service to Specialty Minerals Inc. (SMI). We conclude, based on the pleadings, that IP's planned activity would not make it either a transmission and distribution (T&D) utility or a competitive electricity provider (CEP). Thus, a formal investigation to obtain further facts is not warranted.

II. BACKGROUND

A. CMP Complaint

On August 1, 2000, Central Maine Power Company (CMP) petitioned the Commission, pursuant to 35-A M.R.S.A. § 1302(3), to open an investigation regarding the plans of SMI to take electric service directly from IP. Specifically, CMP requests that the Commission determine whether the planned activity would make IP either a CEP or a T&D utility.

In its Petition, CMP states that SMI operates a facility in Jay, Maine, that manufactures precipitated calcium carbonate that is used for filling and coating in the papermaking process. SMI is currently taking T&D service from CMP under its generally available rate schedule. IP owns a papermaking facility in Jay, Maine and takes T&D service from CMP under a special contract. CMP states that under the contract, IP may purchase T&D services for its own business processes, but may not resell such services to third parties behind its meter (such as SMI). If SMI is allowed to take electric service directly from IP, CMP states it would lose approximately $300,000 in annual revenues.

CMP asserts that 35-A M.R.S.A. § 1302(3) provides the legal basis for its complaint, in that the provision allows a public utility to make a complaint to the Commission as to any matter affecting it own product, services or charges. Because IP's service to SMI would eliminate CMP's provision of T&D service and could result in

shifting costs to other customers, CMP argues that the prerequisites of 35-A M.R.S.A. § 1302(3) are satisfied.

On the merits of the issues presented, CMP claims that IP's planned service to SMI would make it both a CEP and a T&D utility. According to CMP, IP would be a CEP as a result of making retail sales of electricity to a member of the public. CMP argues that the mere fact that IP may make retail sales to a single customer does not affect the analysis of whether it is acting as CEP, because the Restructuring Act does not reference the number of targeted customers and IP (as may be the case with other CEPs) has chosen a niche market based on geography. CMP argues that if IP is not considered a CEP, it will have an unfair advantage over other CEPs that have to comply with statutory and regulatory requirements.

CMP also states that IP would be a T&D utility because it will own and control T&D plant for public use. CMP asserts that IP's planned activity satisfies the Commission's test for "public use" in that IP is a large entity and its arrangement with SMI is presumably motivated by profit. CMP states that an investigation would yield further information relevant to the "public use" standard.

B. IP Response

On August 16, 2000, IP filed a response to CMP's request for an investigation, stating that the Commission should deny CMP's request. IP argues that 35-A M.R.S.A. § 1302(3) does not provide the Commission with jurisdiction over the activities of a private company on the basis that those activities have the potential to affect CMP's rates. If this were the case, CMP would be able to file a complaint against any alternative provider of energy or conservation services on the grounds that their activities could impact CMP's rates.

As to the merits of the complaint, IP states that, under Maine law, it is not a T&D utility because SMI is a tenant of IP and the statutory definition of T&D utility, 35-A M.R.S.A. § 102(20-B), explicitly excludes service to an entity's tenant. IP also denies that it owns any T&D plant and states all electricity provided to SMI will be from IP's generating facility and distributed over private property.

IP also claims that it is not a CEP for two reasons. First, the Restructuring Act was not intended to transform generators that were not public utilities before restructuring into CEPs after restructuring. Second, IP does not sell electricity to the public at retail (the statutory requirement for an entity to be a CEP), because a sale to one entity does not constitute a sale to the "public."

Finally, IP asserts that CMP has taken a series of hostile actions against IP in recent months that it considers to be harassment. IP states that these actions constitute unreasonable acts or practices by a public utility and requests that the Commission order CMP to cease its hostile actions. IP also asks the Commission to find that CMP has filed a frivolous action and to award IP attorney's fees and damages.

C. CMP Reply

On September 6, 2000, CMP filed a reply to IP's response, stating that the purpose of a section 1302 investigation is to gather facts relevant to the alleged activities of public utilities and that IP has provided the Commission with very little factual information regarding its planned transaction with SMI. Specifically, CMP argues that the fact that SMI is a tenant of IP does not answer all the issues raised in its complaint. CMP claims that the tenant exclusion was intended to apply to a situation in which the cost of electricity is included in an all-inclusive lease price; once an entity separately prices electricity, the statute requires the Commission to take jurisdiction over the price and terms of service.

CMP also responds that IP's sale of electricity to SMI would have made it an electric utility prior to the Restructuring Act, and the sale would be a CEP service under the Act. CMP argues that the sale to a single entity does not foreclose the possibility that the sale is to the public; rather, this is just one factor to be considered under Commission precedent. CMP adds that if IP serves SMI from its existing generation and, as a result, it needs to purchase more from CMP's system, then IP is in effect reselling electric service in violation of CMP's terms and conditions.[1]

Finally, CMP disputes IP's claim of harassment through persistent initiation of legal actions against IP. CMP states that it has been acting diligently to protect its legitimate business interests.

III. DISCUSSION

A. Statutory Authority

We review CMP's petition pursuant to our general investigatory authority under 35-A M.R.S.A. §§ 1303 and 3203(13-A). Section 1303 authorizes the Commission to conduct a summary investigation into "any matter relating to a public utility" and, if sufficient grounds are found, to initiate a formal investigation into the matter. Section 3203(13-A) provides the Commission with similar authority to investigate matters related to CEPs.

The essence of CMP's complaint is the allegation that IP's contemplated activity would violate Title 35-A in that IP will be acting as a T&D utility without proper Commission authority and as a CEP without the required license. IP does not dispute that the Commission has jurisdiction under its general investigatory authority to determine whether an entity is acting in violation of Title 35-A. We agree that our investigatory authority under sections 1303 and 3203(13-A) is the proper procedural vehicle for us to consider CMP's complaint regarding the activity of IP.

[1] Because the claim that IP may be violating CMP's terms and conditions is not relevant to the essential issues in this case (i.e., utility and CEP status) and has not been fully argued, we decline to address the matter in this proceeding.

Because we decide to consider CMP's complaint pursuant to our authority under sections 1303 and 3203(13-A), we do not reach the issue of whether a complaint alleging that an entity is acting as a utility or CEP without authority could be brought by a utility under section 1302(3). We note, however, that the determination of statutory authority (either section 1303 or 1302(3)) upon which we proceed in this matter is of little consequence. As stated above, CMP's complaint is essentially a request that the Commission investigate whether an entity is acting in violation of the provisions of Title 35-A. In such a circumstance, as long as the request has a reasonable basis, we would investigate to determine whether an entity may be acting as a utility or a CEP in violation of statute.

B. Status as T&D Utility

We conclude that IP's planned service, as described in its pleading,[2] does not constitute T&D service.[3] Our conclusion is based on the plain language of the statutory definition of T&D utility. T&D utility is defined as:

> a person, its lessees, trustees or receivers or trustees appointed by a court, owning, controlling, operating or managing a transmission and distribution plant for compensation within the State, *except where the electricity is distributed by the entity that generates the electricity through private property alone solely for that entity's own use or the use of the entity's tenant and not for sale to others.*

35-A M.R.S.A. § 102(20-B) (emphasis added).

IP states that SMI is its tenant and electricity service will be provided solely from its generating facility and transmitted only through private property. CMP does not dispute IP's description of the facts, but contends that the exclusion of sales to tenants only applies when the cost of electricity is included as part of the lease price. According to CMP, the exclusion does not apply if the electricity is separately priced.

We find that IP's sale of electricity to SMI falls within the statutory exclusion for sales to tenants. The statutory language is unambiguous and does not specify that the cost of electricity must be included in the lease price. We assume that if

[2] CMP does not dispute any of the facts in IP's pleading that are relevant to the determination of whether IP is or will be acting as a T&D utility or a CEP. We thus accept these facts for purposes of our analysis.

[3] In its pleading, IP states that the ownership of the facilities that will transmit the electricity to SMI has yet to be determined. For purposes of our analysis, we will assume that IP will own the facilities, which is the factual pattern most favorable to CMP's argument.

such a limitation were intended by the Legislature, the statutory language would have so specified. In addition, we are unable to discern why the Legislature, consistent with the statutory purposes, would adopt a distinction based on separately pricing the electricity. Accordingly, we conclude that IP would not be a T&D utility by virtue of its transaction with SMI.[4]

C. Status as a CEP

We also conclude that IP's planned sales to SMI would not make it a CEP under the statute. Section 3201(5) defines a CEP as:

> a market, broker, aggregator or any other entity selling electricity to the *public* at retail. (emphasis added)

Thus, the question raised by CMP's complaint is whether, under the circumstances presented, IP's planned activity constitutes selling to the "public." We find that it does not.

The Legislature has determined that the provision of services to a tenant does not constitute a utility service. Thus, prior to restructuring, an entity that provided generation services to a tenant would not have been considered a public utility. There is no indication that the Legislature intended to transform generation services that did not constitute utility service prior to restructuring into CEP services after restructuring. Accordingly, we find that the sale of generation services to a tenant is a private transaction that does not constitute CEP activity.

Our conclusion that IP is not a CEP is also supported by the statutory definition of "generation service." Generation service is defined as:

> the provision of electric power to a consumer *through a transmission and distribution utility* . . . .

35-A M.R.S.A. 3201(11) (emphasis added). The fundamental aspect of the Restructuring Act is the deregulation of "generation services," 35-A M.R.S.A. § 3202(2). It is thus reasonable to conclude that the Legislature viewed CEPs as the entities that would provide "generation service" after restructuring and that service would be provided through T&D utilities. Thus, our finding that IP will not be providing service through T&D utility facilities supports our conclusion that IP is not a CEP.

CMP argues that if activity such as that planned by IP is not considered CEP service, some entities that sell electricity will have an unfair competitive advantage because CEPs have to comply with statutory and regulatory requirements (e.g., portfolio

[4] We note that the "tenant exception" would not apply if the tenancy is established for the sole purpose of electricity transactions. In such a circumstance, we would consider the tenancy a sham transaction.

requirement). Although CMP's unfair competition argument may have merit, the statute specifies that an entity is a CEP if it sells electricity to the "public." By specifying public sales, we conclude that the Legislature was aware that "private sales" could occur that would not be covered by the requirements of the Restructuring Act. If the Legislature had intended to cover all electricity sales, whether "public" or "private," the definition of CEP would not have been restricted to public sales.

D. Allegations of Harassment

We find no basis to support IP's allegations in this proceeding that CMP has engaged in a pattern of harassment. We conclude that CMP's request for an investigation in this case, as well as the other actions cited by IP, were generally reasonable and within CMP's legitimate business interests to have pursued. Thus, we deny IP's request that we award fees and damages.

E. Conclusion

For the reasons discussed above, we conclude that IP's planned activity would not make it either a T&D utility or a CEP. A formal investigation to obtain additional facts is, therefore, not warranted.

Dated at Augusta, Maine, this 6th day of April, 2001.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.